

Internal Revenue Service
memorandum

TL-N-1230-88

CC:TL:TS

TSANDERSON

date: **17 FEB 1988**

to: District Counsel, Denver SW:DEN

from: Director, Tax Litigation Division CC:TL

subject: Section 6621(c)/ [REDACTED]

This memorandum responds to your request for technical advice of October 16, 1987. Your office had received a request for advice from Examination on the issues below.

Issues

1. Whether to issue a statutory notice of deficiency asserting only the § 6621(c) interest.
2. Whether the § 6621(c) interest should be assessed without the issuance of a statutory notice of deficiency.

Conclusions

1. The Service does not have authority to issue a statutory notice concerning only § 6621(c) interest. Moreover, the Tax Court would not have jurisdiction over a petition pertaining only to interest, since, with a few exceptions, it only has jurisdiction over petitions for a redetermination of a deficiency. Interest is not included in the definition of a deficiency.
2. The interest, including the § 6621(c) interest, should be assessed and collected without the issuance of a statutory notice of deficiency.

Facts

The taxpayers' returns for [REDACTED], [REDACTED], [REDACTED], and [REDACTED] were audited in [REDACTED]. The Revenue Agent disallowed farm losses for [REDACTED] and [REDACTED] and medical equipment leasing shelter losses for [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. She also disallowed an investment tax credit taken in [REDACTED] with respect to the medical equipment shelter. The adjustments resulted in deficiencies for each year. The audit also concerned TEFRA partnership issues, but only the non-TEFRA issues are being processed at this time.

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On [REDACTED] the taxpayers executed a Form 870 which was received by the Denver District Director on January 5, 1987. The taxpayers agreed to all of the deficiencies resulting from the non-TEFRA adjustments, as shown on the 870, and consented to the immediate assessment and collection of the deficiencies, waiving the restrictions on assessment and collection. No statutory notice of deficiency has been issued, and it is our understanding that all of the deficiencies have been assessed.

The Revenue Agent determined that the underpayments for all the years were substantial underpayments attributable to tax-motivated transactions under § 6621(c)(formerly (d)). Accordingly, she determined that the increased rate of interest (120% of the underpayment rate established under § 6621(a)(2)) was applicable. 1/

The taxpayers did not agree to the application of the increased rate of interest. Therefore, the only issue remaining unagreed, as to the non-TEFRA adjustments, concerns the application of the increased rate of interest.

Discussion

Issue 1

The Service has the authority and obligation to make the determinations and assessments of all taxes (including interest) imposed by the internal revenue laws. I.R.C. § 6201(a). However, the Service is authorized to issue a statutory notice of deficiency only after it "determines that there is a deficiency." I.R.C. § 6212(a).

Deficiency is defined as follows:

(a) In General.--For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, 44, and 45, the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, 44, or 45, exceeds the excess of--

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

1/ We point out that the increased rate of interest applies only to interest accruing after [REDACTED].

- (B) the amounts previously assessed (or collected without assessment) as a deficiency, over--
- (2) the amount of rebates, as defined in subsection (b)(2), made.

I.R.C. § 6211(a).

Deficiency, as defined above, does not include interest, nor is interest subject to the deficiency procedures:

- (e) Applicable Rules.--Except as otherwise provided in this title--
 - (1) Interest treated as tax.--Interest prescribed under this section on any tax shall be paid upon notice and demand, and shall be assessed, collected, and paid in the same manner as taxes. Any reference in this title (except subchapter B of chapter 63, relating to deficiency procedures) to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax.

I.R.C. § 6601(e)(1).

Section 6621(c) interest is simply an increased rate of interest prescribed under § 6601:

- (c) Interest on Substantial Underpayments Attributable to Tax Motivated Transactions.
 - (1) In general.--In the case of interest payable under section 6601 with respect to any substantial underpayment attributable to tax motivated transactions, the rate of interest established under this section shall be 120 percent of the underpayment rate established under this section.

I.R.C. § 6621(c)(1).

Based on the above, the Service does not have authority to issue a statutory notice determining only that § 6621(c) interest is owed.

As an additional matter, the Tax Court is a court of limited jurisdiction. I.R.C. § 7442. Generally, the Court lacks jurisdiction to decide issues concerning interest. Transport Manufacturing & Equipment Company v. Commissioner, 434 F.2d 373, 381 (8th Cir. 1970); Commissioner v. Kilpatrick's Estate, 140 F.2d 887 (6th Cir. 1944); Engl v. United States, 658 F. Supp. 698 (N.D. Ill. 1987); cf. Baumgardner v. Commissioner, 85 T.C. 445 (1985) (concluded that the Court had jurisdiction to consider payments of interest as part of an overpayment under § 6512(b)'s

grant of jurisdiction to determine overpayments). Also, in this case the Court would not have jurisdiction in the first instance since the taxes have already been assessed, thereby eliminating any deficiency to be determined in a statutory notice. See McConkey v. Commissioner, 199 F. 2d 892 (4th Cir. 1952), cert. denied, 345 U.S. 924 (1953). With a few exceptions not relevant here, the Tax Court has jurisdiction only over petitions for redetermination of deficiencies. Tax Ct. R. 13(a).

Congress did, in 1984, extend the Court's jurisdiction to allow it to determine the portion of the deficiency which is a substantial underpayment attributable to tax-motivated transactions:

(4) Jurisdiction of Tax Court.-- In the case of any proceeding in the Tax Court for a redetermination of deficiency, the Tax Court shall also have jurisdiction to determine the portion (if any) of such deficiency which is a substantial underpayment attributable to tax motivated transactions.

I.R.C. § 6621(c)(4).

However, Congress did not amend the definition of a deficiency under § 6211 to include a determination under § 6621(c). Therefore, the Tax Court's extended jurisdiction is contingent upon the initial determination, by the Service, of an underlying deficiency.

Since the Service does not have authority to issue a statutory notice of deficiency determining only the amount of § 6621(c) interest, and the Tax Court would not have jurisdiction to redetermine such amount by itself, we conclude that a statutory notice asserting only § 6621(c) interest should not be issued.

Issue 2

The taxpayers agreed to all of the non-TEFRA deficiency adjustments and consented to the immediate assessment and collection of the deficiencies, waiving the restrictions on assessment and collection of deficiencies contained in § 6213(a). See I.R.C. § 6213(d) (the taxpayer can waive the restrictions on the assessment and collection of the whole or any part of the deficiency). It is our understanding that all of the deficiencies have been assessed; therefore, there are no longer any deficiencies.

Interest is not independently subject to the deficiency procedures, including the restrictions on assessment and collection. If no restrictions remain on the assessment and collection of the underlying deficiencies, there are no restrictions on the assessment and collection of the interest. I.R.C. § 6601(g). Therefore, interest, including § 6621(c)

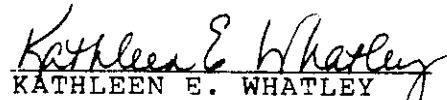
interest, should be assessed and collected under normal procedures.

We point out that, with the notice and demand for payment of interest, the taxpayers should be fully apprised that interest has been computed pursuant to § 6621(c). Further, the taxpayers should be informed of the nature of the underpayments, i.e., that the underpayments resulted from the disallowance of the farm losses and the medical equipment leasing shelter adjustments, and whether part or all of the underpayment for each year is attributable to tax-motivated transactions. 2/ With regard to the latter point, attached for your information is the pattern language used in statutory notices.

If you have any further questions regarding this matter, contact Ted Sanderson on (FTS) 566-3233.

MARLENE GROSS

By:


KATHLEEN E. WHATLEY
Chief, Tax Shelter Branch
Tax Litigation Division

Attachment:
As stated.

2/ We note that the Revenue Agent's workpapers reflect that the losses from the medical equipment leasing shelter were disallowed as not being deductible under § 162 or § 212 because such losses were not incurred in a trade or business or with respect to property held for the production of income, while the farm losses were disallowed as being attributable to an activity not engaged in for profit under § 183. Technically this does not bring the medical equipment loss disallowances within the scope of those adjustments attributable to tax-motivated transactions. I.R.C. § 6621(c)(3); Prop. Treas. Reg. § 301.6621-2T. However, it seems that the medical equipment losses could have also been disallowed under § 183. See I.R.C. § 183(c) ("activity not engaged in for profit" includes any activity with respect to which deductions are not allowable under § 162 or under paragraph (1) or (2) of § 212). Deductions disallowed under § 183 are considered attributable to tax-motivated transactions. Prop. Treas. Reg. 301.6621-2T A-4(1). Furthermore, the workpapers reflect that the investment tax credit was disallowed because the medical equipment leasing shelter was a "sham," which makes this adjustment attributable to a tax-motivated transaction. I.R.C. § 6621(c)(3)(A)(v): see also Patin v. Commissioner, 88 T.C. 1086, 1125 (1987) (sham, under § 6621(c), means a transaction which has no economic substance). This could have also been an alternate ground for disallowing the shelter losses. In any event, the notice need not specifically identify the types of tax-motivated transactions that exist.

NOTICES OF DEFICIENCY

For those cases in which the entire underpayment is attributable to tax motivated transactions, use the following language:

The entire underpayment of your income tax(es) for the tax year(s) 19__ (and 19__) is a substantial underpayment attributable to tax motivated transactions under section 6621(c) of the Internal Revenue Code.

Accordingly, the annual rate of interest payable on your income taxes for the tax year(s) 19__ (and 19__) resulting from the substantial underpayment of tax attributable to tax motivated transactions shall be 120 percent of the adjusted rate established under section 6621(a) of the Internal Revenue Code.

For those cases in which only part of the underpayment is attributable to tax motivated transactions, use the following language:

Part of the underpayment of your income tax(es) for the tax year(s) 19__ (and 19__) is a substantial underpayment attributable to tax motivated transactions under section 6621(c) of the Internal Revenue Code. The underpayment(s) attributable to tax motivated transactions is (are) \$ _____ for the tax year 19__ (and \$ _____ for the tax year 19__), as determined on Schedule ____.

Accordingly, the annual rate of interest payable on your income tax for the tax year(s) 19__ (and 19__) resulting from the substantial underpayment of tax attributable to tax motivated transactions shall be 120 percent of the adjusted rate established under section 6621(a) of the Internal Revenue Code.